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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN SARNO et al.,

Plaintiffs and Respondents,

v.

ALLISON BAILES et al.,

Defendants and Appellants.

G056460

(Super. Ct. No. 30-2017-00942737)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Law Office of Ryan T. Darby and Ryan T. Darby for Defendants and Appellants.

Neasham & Kramer, Patricia Kramer and Chad A. Vierra for Plaintiffs and Respondents.

Allison Bailes<sup>1</sup> appeals from the trial court's order denying a special motion to strike<sup>2</sup> John Sarno (John) and Leslee Sarno's (Leslee)<sup>3</sup> complaint for defamation, invasion of privacy, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy. Defendants argue the court erred because the Sarnos' claims arose from protected activity. We disagree and affirm the order.

## FACTS

### *I. Substantive Facts*

The facts are derived from the complaint and the evidence submitted in connection with the special motion to strike. (§ 425.16, subd. (b)(2).)

#### *A. Disneyland Social Clubs*

Disneyland enthusiasts created unincorporated associations to socialize with each other in the park. The social clubs were named for a Disney character or theme, and in the park, members wear clothing, etc., identifying their club. The social clubs maintain Web pages on social media platforms. Two of the social clubs are “The Main St. Fire 55 Social Club” (MSF) and the “White Rabbits Social Club” (WR).

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<sup>1</sup> The other defendants and appellants are Sara Alatorre, Rachel Backstrom, Tom Backstrom, Brad Baldwin, Jeff Berganza, Stephen Blackshear, Adrianna Brown, Chris Cleary, Joseph Conchelos, Aston Dominguez, Jesse Flores, Abe Hayes, Cortnee Kleidon, Chrissy Littlefield, Christopher Machado, Michael Marquez, Steven Rivera, Chris Scheliga, and Gabriella Soto. We refer to them collectively as Defendants. We refer to Rachel Backstrom and Tom Backstrom collectively as the Backstroms.

<sup>2</sup> A special motion to strike is also known as an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion. (Code Civ. Proc., § 425.16, all further statutory references are to the Code of Civil Procedure; *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.)

<sup>3</sup> For sake of clarity we refer to John and Leslee individually by their first names and collectively as the Sarnos.

### *B. John & MSF*

John was previously a licensed emergency medical technician (EMT) in Sacramento. John visited Disneyland for decades and was an annual pass holder. After John and Leslee were married, they visited the park together; John never visited the park without her.

In 2015, John formed MSF, which he named for the park's fire station on Main Street, and it had about 10 members. Each member adopted a fictional firefighter rank that he/she wore on a name tag on his/her club jacket; John's was "Battalion Chief." MSF had an Instagram account and two Facebook pages, one for its Southern California members and one for its Northern California members.

In September 2015, the Sarnos decided to have MSF sponsor a fundraising walk at Disneyland on September 11, 2016, and donate the money to a scholarship fund for children of 9/11 firefighters who died. The Sarnos decided to limit the number of participants in the walk to 343, the number of firefighters who died on 9/11. John contacted WR and other social clubs to see if any of their members wanted to participate.

### *C. Jakob Fite<sup>4</sup> & WR*

Jakob formed WR in April 2014, and by 2016, it had 200-300 members.<sup>5</sup> WR had a Facebook page. Fite created "Club Hub," which was a private Facebook chat room where, with Fite's permission, any Disneyland social club members could communicate online. Fite hosted podcasts where he discussed Disneyland and its social

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<sup>4</sup> In addition to the 20 Defendants and appellants that are the subject of this appeal, the Sarnos also sued Jakob Fite, his wife Melissa Fite, and WR. For sake of clarity we refer to Jakob and Melissa individually by their first names and collectively as the Fites. Their appeal is the subject of the related case, *Sarno v. Fite* (July 18, 2019, G056456) [nonpub. opn.]. We provide background on the Fites because Jakob's conduct was the impetus for both proceedings.

<sup>5</sup> Some of the Defendants were WR members.

clubs. Fite's podcasts aired on iTunes, Mixcloud, SoundCloud, YouTube, Facebook, Podbean, Spotify, and Player FM.

#### *D. MSF & "The Mermaids"*

While at Disneyland in early 2016, the Sarnos met Gabriella Soto, who was a member of the social club "The Mermaids," and Soto's daughter (Little Doe).<sup>6</sup> One day at the park, Soto and Little Doe were walking with MSF members to a ride when someone bumped into John, which knocked him off balance. Little Doe saw this and said, "Don't worry, I've got your back[]" and "I'll be your bodyguard." When they got to the ride there was a long line. Soto asked if she could leave Little Doe with MSF members. They agreed and made arrangements with Soto to meet after the ride. After the ride ended, MSF members walked Little Doe to the designated meeting place where they met Soto.

#### *E. Disneyland Coins*

About the same time, MSF ordered 40 limited edition, numbered "Tomorrowland" coins. MSF planned to use the coins as an admission ticket to a barbeque later that summer, and MSF members also used the coins in a scavenger hunt game—when someone found the coin he/she took a photograph of the coin and posted it on social media. MSF distributed coins to 38 people at the park, including Little Doe.<sup>7</sup>

#### *F. Communication Between Little Doe & John*

On the morning of February 16, 2016, Little Doe sent a message to the MSF Instagram account apologizing she had not posted a photograph of her coin. All MSF members had access to the MSF Instagram account (log in and password) and could

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<sup>6</sup> Like the parties, we will refer to Soto's daughter as Little Doe.

<sup>7</sup> In her declaration, Soto stated John told Little Doe the coin entitled her to admission to Club 33, a private club at the park. In his declaration, John denied this.

see any messages sent to or from that account. The following communications were all sent through the MSF Instagram account.<sup>8</sup>

John responded it was “cool” she planned to post a photograph of the coin and said, “I’m glad you have my back.” Little Doe responded, “I got chu I got chu.” John reminded Little Doe that she needed the coin to get into the barbeque and participate in the games. Little Doe asked if her coin entitled her or her family admission into the barbeque. John answered her family. Little Doe said that was “good” because her mother did not have a coin. John stated she was not “cool enough” and he gave Little Doe the last coin. Little Doe said she was “lucky.”

Late the following evening, John asked, “You going to have my back on the 28th? I need my peeps with me.” The following morning, Little Doe said it depended on her mother.

On February 24, 2016, John stated the following: “I’m going to need my body guard Sunday. Hope you are ready for Sunday Funday.” Little Doe apologized because she lost her coin at the park. John stated she could have his coin because she deserved to have it. After he asked whether she checked lost and found, he said, “But I got your back.” After a couple messages about lost and found, John repeated she could have his coin. Little Doe said he was the “best.” John said he had another coin for her because “I can’t have my bodyguard coinless.” Little Doe asked how she was his bodyguard. John stated, “If anybody pushes me down and kicks popcorn in my face you take the popcorn and run.” Little Doe said she would get the popcorn and the drink. John responded with two images: a red and white striped box with popcorn; and a glass mug filled with amber liquid and foam rolling down the side of the mug. Little Doe

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<sup>8</sup> We provide the messages verbatim without correcting or noting errors in spelling, usage, or grammar. Additionally, many of the messages and communications between John and Jakob include italics and bold. We have omitted the italics and bold without indicating the omissions for ease of reading.

replied, “Lol I don’t drink beer.” John stated the following: “Neither do I but I couldn’t find soda. So it’s cream soda in a ice cold mug.” Little Doe responded affirmatively.

Two weeks later, John stated, “Happy Wednesday, almost time to be at the park.” Little Doe asked when he was going to the park. John replied, “We will be in the park towards the end of the month.”

About one month later, on April 3, 2016, at 2:35 a.m., John stated the following: “You all in the park tomorrow? We will be and I need my bodyguard.” Soto sent the following message: “Hey this is [Little Doe’s] mom please don’t message [her] if u want to hang out w the mermaids message me u have no reason to contact my daughter or else precautions will be taken place!” The next morning at 10:55 a.m., John replied the following: “I’m sorry I’m so use to talking the young adults I don’t think. You are very right. Wanted to let you all know we were here.” Soto responded, “Yea but this is a child n I don’t like that so I would appreciate if u can not message her it is weird that u would want to have a relationship w a child thank u m we will b at the parks later.” John replied the following: “I agree 100% with you. See you later. I thought you knew she texted to ask a question.”

#### *G. Interactions Between Soto & John*

In April 2016, the Sarnos visited Disneyland and saw Soto and Little Doe at least once. John and Soto provided different accounts of their interactions. John stated he apologized to Soto, and she accepted his apology. Soto said John appeared uncomfortable and avoided her.

#### *H. Interactions Between John & Jakob*

John and Jakob disagree about when they first met. John stated that while he was at California Adventure in April 2016, Jakob and two male WR members approached him. Jakob said he was the head of WR and “nothing happens in Disneyland without my permission.” Jakob told John that he was the park’s “unofficial security” and MSF could only do the walk if he paid Jakob \$500 to “provide security.” John said the

walk would be free to participants and they expected it to be peaceful. Jakob repeated WR “kept all the [s]ocial [c]lubs in ‘order’” and “you will be paying us for security or your social club will be going away.” Jakob disputes this meeting occurred and denied ever demanding money from him—Jakob asserted he did not meet John until September 11, 2016, the day of the fundraiser.

On August 22, 2016, John sent a message to Jakob through the Club Hub Facebook page to ask if he could post updated information about the walk. Jakob agreed.

On August 30, 2016, Jakob sent a message to John through the Club Hub Facebook page about a complaint from Soto. In the message Jakob asked John why he was sending messages to 12-year-old Little Doe and that a police officer in John’s hometown said John had “complaints against [him].” John explained his conduct related to a coin and said he did not have any complaints against him. After Jakob said Soto confronted John in the park, John denied the confrontation occurred. Jakob requested copies of John’s messages to Little Doe so he could “clear it up before a wild fire burns.” Jakob added, “I don’t fuck around with kid stuff.”

The next day, Jakob sent John a message stating he paid to have a background check run on him. Jakob said it did not appear John was a firefighter but was impersonating one. He acknowledged Little Doe contacted John first, but John continued to message her for one month. Jakob concluded that when he confirmed what John had done, he would give John “a couple options of what you can do.” John responded he had been through multiple background checks for professional and personal reasons and had nothing to hide. He added Jakob could do what he thought he should do, but “there are always consequences for every action.” Jakob agreed John’s messages to Little Doe were not criminal, but they were inappropriate, and Jakob made veiled threats.

About an hour later, Jakob sent John the following message: “You fucked up. In a big way. And you cannot be allowed around the [social club] community. Now there are a couple ways to do that. You come down do your walk and after that never

show up in a vest in the parks again. Or if you refuse. I put all the messages and the proof your not a firefighter when I get the hard copy and put it together and spread the word everywhere and you can be hated by hundreds of people. And show everything to security get your pass revoked and make you the poster boy of what not to do in the SC community.” Jakob added, “Does your wife know that your were contacting 12 yo girls? . . . Does the rest of your family need to know your kids, the foster agency.” John agreed to leave MSF but asked Jakob to come to the walk because he had a gift for him.

### *I. The MSF 9/11 Walk*

A few days before the fundraiser, the Sarnos travelled to Disneyland to set up the event. On September 10, 2016, MSF members conducted registration for the walk as John stood nearby. The same two male WR members who John claimed approached him with Jakob in April arrived and told John to meet Jakob the following day at 4 p.m. at the flag lowering ceremony in Disneyland. John agreed.

On September 11, 2016, the MSF fundraiser walk occurred without incident.

John and Jakob disagreed about what happened when they met. John stated that at the appointed time and place, John met Jakob, who was accompanied by four men wearing WR jackets. Jakob asked, “Where’s my \$500?” John said he was not going to pay him. Jakob, who was angry, said, “Are you scared? Do you know I can destroy you? There won’t be anything you can do about it.” After Jakob put his hand on John’s shoulder and pulled him close, John said “F[uck] you, take your hand off of me and don’t threaten me again.” As the five men moved towards him, John told them to “back off.” Jakob said he was going to destroy John’s reputation and “You don’t know who you are dealing with, and you’ll be sorry.” John pushed past the group and left the park with Leslee. The Sarnos have not returned to Disneyland. Jakob stated John accosted him during this meeting.

Two days later, Jakob sent John a message with a link to a SoundCloud podcast that was scheduled to air that night. Jakob included the following message: “Hey here is a little sample of what’s going to be going on the public radio show tonight dedicated to you. . . . It’s going to be epic. Remember I told you to walk away but you asked for the flood of attention that your going to get.” Jakob threatened to distribute the podcast widely.

*J. After the “9/11” Event*

After the event, the Sarnos traveled to Henderson, Nevada to visit John’s widowed mother. After returning to Sacramento, Leslee donated \$1,055 to the Michael Lynch Memorial Foundation. Shortly after the Sarnos returned home, they learned Jakob was writing terrible things about them on the Club Hub and WR Facebook pages. The Sarnos had previously been accepted to access those social media sites and could view and print messages. Transcripts of the podcasts span hours.

*K. Defendants’ Conduct*

Following Jakob’s September 13, 2016, message to John, Jakob and Defendants used social media to discuss the Sarnos. On September 16, 2016, Jakob posted a message on Facebook that stated he was willing to go to Facebook prison because of “John the pedophile.” One or more Defendants made oral and written statements John was a pedophile/child predator, the Sarnos engaged in fraud and stole fundraising money to use for personal and in some cases illicit activity, and John stole valor by impersonating a firefighter. Jakob obtained the Sarnos’ medical records and disclosed their medical information on podcasts, which resulted in online posts discussing the Sarnos’ fertility issues and prescription drug use.

## *II. Procedural Facts*

After the Sarnos filed a complaint on September 11, 2017, they filed a first amended complaint (FAC) against Defendants<sup>9</sup> alleging the following causes of action: defamation; invasion of privacy; intentional infliction of emotional distress (IIED); negligent infliction of emotional distress (NIED); and civil conspiracy.

The following is a non-exhaustive list of the FAC's allegations against Defendants: printed T-shirts with John's name and/or likeness warning he was a pedophile and wore them in the park; printed and posted photographs of John in Sacramento stating he was a pedophile; superimposed photographs of the Sarnos on other images accusing them of committing crimes of moral turpitude; accused the Sarnos of fraudulently stealing fundraiser proceeds and using the money to gamble; made false reports to law enforcement, online payment system, and media the Sarnos committed fraud and theft; unlawfully accessed the Sarnos' medical records, distributed that information, and posted that information online and conducted other background checks; accused the Sarnos of being drug addicts and published the medications they used; performed, broadcasted, republished, posted, reposted, and tagged podcasts and videos on social media platforms that defamed the Sarnos; and conspired to broadcast and broadcasted live podcasts at a local park near the Sarnos' home and Leslee's place of employment to defame the Sarnos.

The defamation claim detailed each of the Defendants' oral/written statements. The invasion of privacy claim incorporated by reference the FAC's allegations and alleged Defendants intruded into their private information by conducting

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<sup>9</sup> In addition to the Defendants and the Fites and WR, the Sarnos also sued the following: Jamie Manzuik; Elda Marchese; Brandon Morse; Nicole Navarro; Brandon Roebling; Kayla Roebling; Shaun Ryon; Disneyland Inc.; and Kaiser Foundation Health Plan, Inc., The Permanente Medical Group, Inc., Kaiser Foundation Hospitals, Inc. (Kaiser). The Sarnos also alleged negligence claims against Disneyland and Kaiser.

unauthorized background checks and obtaining their medical records. The IIED and NIED claims stated Defendants' conduct caused the Sarnos to suffer emotional distress. Finally, the civil conspiracy claims alleged Defendants conspired with the Fites and each other to defame, invade the Sarnos' privacy, and cause them emotional distress.

Defendants filed a special motion to strike the FAC. Defendants supported the motion with exhibits and declarations from all but one of the 20 Defendants. In the notice, Defendants sought "to strike the causes of action—and all individual allegations—against them in the [FAC]." On page six of the points and authorities, Defendants provided the gravamen of the FAC's allegations, defamation, invasion of privacy, and conspiracy, and referred to paragraphs 14 to 19, and 24, and pages 14 to 52.

The Sarnos filed an opposition supported by exhibits and declarations from John, Leslee, and Robert Venezia. In his declaration, John denied preying on or "groom[ing]" Little Doe or any other illicit intent. He denied appearing at "a fire event" or "emergency incident" and claiming he was a firefighter, paramedic, or EMT. In their declarations, the Sarnos denied using any of the MSF fundraiser walk proceeds to gamble. In his declaration, Venezia stated he was a private investigator who interviewed Tiernan Curl, a former Disneyland social club member. Curl told Venezia that Jakob obtained the Sarnos' medical records from Nicole Navarro, a Kaiser employee who was trying to become a WR member. Defendants filed a reply supported by declarations from each of the Defendants.

At a hearing on the motion, the trial court described Defendants' special motion to strike as an "all-or-nothing motion[]" because it sought to strike all the causes of action and all the allegations. The court opined Defendants had to "destroy the entire pleading[]" because the motion did not specify any portions or lines it sought to attack,

citing to California Rules of Court, rule 3.1322(a) (Rule 3.1322(a)).<sup>10</sup> After indicating a special motion to strike could not successfully attack an invasion of privacy claim because it depended on conduct not words, the court invited argument.

When Defendants' counsel invited the court's attention to page six of the points and authorities, the court replied, "too late." After reading page six, the court indicated Rule 3.1322(a) required the portions to be struck to be quoted in full.

Defendants' counsel indicated he sought to strike all causes of action and all allegations in the FAC. The court again referred Defendants' counsel to the invasion of privacy claim, which was based on obtaining the Sarnos' medical records. The court denied Defendants' special motion to strike.

## DISCUSSION

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385, fn. omitted (*Baral*).)

Section 425.16, subdivision (e), provides four categories of such acts. Defendants rely on the last two: "(3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

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<sup>10</sup> Rule 3.1322(a) states in relevant part, "A notice of motion to strike a portion of a pleading must quote in full the portions sought to be stricken except where the motion is to strike an entire paragraph, cause of action, count, or defense."

### *Defendants' Initial Burden*

Although the *Baral* court was concerned with the second prong (*Baral*, *supra*, 1 Cal.5th at p. 385), it provided guidance on the first prong analysis (*id.* at p. 396). “At the first step, the moving defendant bears the burden of *identifying all allegations of protected activity*, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached.” (*Ibid.*, italics added.) Our review is de novo. (*Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 876.) “‘If the trial court’s decision is correct on any theory . . . , we affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion.’ [Citation.]” (*Ibid.*)

In their opening brief, Defendants state there is no “ambiguity” and they request we “strike all allegations, paragraphs, and causes of action from the FAC that run afoul of [s]ection 425.16.” Included as an exhibit to their opening brief is a list of Defendants statements without any explanation. In their reply brief, they add “the obvious aim of the motion . . . is to strike the . . . [d]efendants from the complaint entirely, or alternatively, to strike individual allegations against them the [c]ourt deems appropriate.”

We agree with the trial court that because Defendants seek to strike the FAC entirely they must establish all the allegations arise from protected activity to be successful. They failed that burden.

Assuming for the purposes of argument that Rule 3.1322(a) authorizes a trial court to strike individual allegations and claims, Defendants have not carried their burden. On appeal, Defendants state “alternatively” they seek to strike “whatever portions thereof the [c]ourt deem appropriate.” Defendants acknowledge “the complaint alleges dozens of defamatory statements over 34 pages.” But in their first prong analysis,

they do not mention any of those statements. They repeat the mantra John’s predatorial nature and the Sarnos’ fraudulent activity is a matter of public interest. But Defendants do not discuss the elements of any of the causes of action or explain how allegations supporting those elements arise from protected activity. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063.) If Defendants believe the Sarnos pleaded mixed claims, they do not identify what was protected speech and what was unprotected speech.

“‘It is the appellant’s responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant’s behalf.’ [Citation.] . . . [Citation.] Matters not properly raised or that are lacking in adequate legal discussion will be deemed forfeited. [Citation.] [¶] In other words, it is not this court’s role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness. Rather, an appellant is required to present a cognizable legal argument in support of reversal of the judgment. ‘When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary.’ [Citation.] ‘Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, [they are] waived.’ [Citation.]” (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 599-600.)

It was Defendants’ responsibility to explain with reasoned analysis what portions of the FAC arose from protected activity and should be struck. They failed to do that. De novo review does not require this court to cull the record to determine what portions of the FAC should be struck. We decline their invitation to strike “whatever portions . . . [we] deem appropriate.”<sup>11</sup>

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<sup>11</sup> In their reply brief, Defendants provide a table, similar to a separate statement, where they explain why each statement is not defamatory. We do not consider points raised for the first time in a reply brief. (*Nordstrom Com. Cases* (2010)

### *Matter of Public Interest*

Even if Defendants met their burden of identifying what they believed was protected activity, a review of the activity generally referenced in the record demonstrates none of it was protected. The Sarnos' invasion of privacy claim was based on Defendants conducting background checks on them and accessing, distributing, and posting the Sarnos' Kaiser medical records to humiliate them.<sup>12</sup> The claim asserts this information included the medications physicians prescribed to them.

In their special motion to strike and on appeal, Defendants assert their conducting a background check into whether John was a child predator and whether the Sarnos engaged in fraud were a matter of public interest. They state all of the Defendants' investigatory comments must be viewed through this lens. On appeal, Defendants deny obtaining the Sarnos' medical records, while acknowledging the legitimacy of the Sarnos claims is not the subject of the first prong analysis. (*Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1388.) Relying on *Taus v. Loftus* (2007) 40 Cal.4th 683 (*Taus*), and *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156 (*Lieberman*), Defendants assert section 425.16 can apply to "invasive conduct . . . so long as it is 'in furtherance' of reporting an issue of public interest." (*Taus, supra*, 40 Cal.4th at p. 713 [defendants' investigation into validity of scholarly article preparatory to publishing responsive articles, including interview plaintiff alleged fraudulently obtained, in furtherance of their right of free speech]; *Lieberman, supra*, 110 Cal.App.4th at pp. 165-166 [defendant's newsgathering preparatory to publishing of news report, including surreptitious videotape recordings plaintiff alleged were illegally obtained, in furtherance of their right of free speech].)

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186 Cal.App.4th 576, 583 (*Nordstrom*).)

<sup>12</sup> In their reply brief, Defendants assert the invasion of privacy claim was based only on "obtaining" the medical records. When read in its entirety, the claim was based on accessing, distributing, and posting their medical records.

Although section 425.16 does not define “an issue of public interest,” decisional authority has provided some guidance. Mere curiosity is not a matter of public interest. (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132.) For a matter to be considered a matter of public interest, it should be a matter of concern to a substantial number of people. (*Ibid.*) A matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. (*Ibid.*) There should also be a degree of closeness between the challenged statements or activity and the asserted public interest. (*Ibid.*) The assertion of a broad and amorphous public interest is insufficient. (*Ibid.*) And the focus of the speaker’s conduct should be the public interest, not a private controversy. (*Id.* at pp. 1132-1133.)

Defendants’ investigation was mere curiosity arising out of a private controversy, not a public controversy. Defendants’ personal misgivings about Sarnos’ text messages with Little Doe did not amount to a matter of public interest. At best, the interested audience was a small one consisting of fellow WR members. Although pedophilia is a matter of concern to a substantial number of people, the assertion of such a broad and amorphous public interest is not sufficient to render the Defendants’ activity protected.

In their invasion of privacy claim, the Sarnos allege Defendants accessed, obtained, distributed, and posted John’s and Leslee’s medical records, including John’s and Leslee’s prescribed medications. Defendants accused John of being a child predator and John and Leslee of fraud and stealing charitable contributions. How is accessing, obtaining, distributing, and posting *Leslee’s* medical records an issue of public interest? Defendants offer no explanation as to how Leslee’s medical records would reveal

whether she engaged in fraud or stole fundraiser money.<sup>13</sup> Or was their goal more sinister—did they merely want to humiliate her because they felt she was complicit in John’s conduct.<sup>14</sup> In her declaration, Leslee stated she listened to the podcasts and the Fites and the Backstroms accused her of being a drug addict. Regardless of their motive, Defendants’ conduct concerning Leslee was not a matter of public interest.

The same reasoning must be applied to Defendants’ assertion that obtaining, distributing, and posting John’s medical records was a matter of public interest. Similar to Leslee, John’s medical records were of no relevance to the issue of whether he engaged in fraudulent conduct vis-à-vis the MSF fundraiser walk. Nor were his medical records relevant to whether he was a child predator. Defendants offer no explanation about how John’s medical records would assist in determining whether he preyed on Little Doe, or had preyed on any child in the past. The record includes no

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<sup>13</sup> In their reply brief, Defendants assert this was a legitimate basis to investigate both Leslee and John. We will not consider points raised for the first time in a reply brief absent good cause, which Defendants do not establish. (*Nordstrom, supra*, 186 Cal.App.4th at p. 583.) On the merits, this is tenuous at best.

<sup>14</sup> In their declarations, Dominguez and Scheliga stated John told them that he was a firefighter. In a text to social club member Josh Howard, Leslee addressed John’s representations, writing the following: “I am in no way condoning [John’s] lying - hopefully he learned from this. But he was a student. He has a problem. I’ve tried to help him but it’s like he doesn’t understand. He isn’t a bad guy though. He just likes helping people and making them laugh and being there for others. His lying is completely wrong though. And I am sorry for that. . . . Wish he didn’t but I can’t change that.”

The day after the MSF fundraiser walk, an Orange County Register article reported on the event. In her declaration, Leslee stated the article initially reported John was a firefighter but she requested a correction and the reporter revised the article to report he was an EMT. The record includes John’s EMT license certification. It was valid from July 30, 2010, to March 31, 2012.

evidence John was ever convicted of a crime against a child. This was simply curiosity on Defendants part. It appears from the record before us it was a fishing expedition to obtain information about the Sarnos to humiliate them. They succeeded. In his declaration, John stated Jakob commented he lied about a back injury, misused prescribed medications, and had fertility issues. At least one of the Defendants, Alatorre, commented on the Sarnos' fertility issues. Defendants' conduct concerning John was not a matter of public interest.

Thus, the basis of the Sarnos' claims did not arise from the Defendants' free speech rights and was not protected by section 425.16. The trial court properly denied Defendants' special motion to strike.

### *Sanctions*

After oral argument this court advised counsel and Defendants it was considering imposing sanctions on the grounds this appeal is frivolous, included numerous misrepresentation to this court, and was taken and maintained solely for the purpose of causing delay. After this court provided notice of the possibility of sanctions, it held a hearing.

Code of Civil Procedure section 907 allows a reviewing court to “add to the costs on appeal such damages as may be just” when it appears that an appeal is frivolous or taken solely for delay. California Rules of Court, rule 8.276(a) allows the Court of Appeal on its own motion to impose sanctions on a party or an attorney for: “(1) Taking a frivolous appeal or appealing solely to cause delay; [¶] (2) Including in the record any matter not reasonably material to the appeal’s determination; [¶] (3) Filing a frivolous motion; or [¶] (4) Committing any other unreasonable violation of these rules.”

In *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 (*Flaherty*), the California Supreme Court explained the rationale for the imposition of sanctions against a party by a reviewing court: “An appeal taken for an improper motive represents a

time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts.” (*Flaherty, supra*, 31 Cal.3d at p. 650.) *Flaherty* set forth both an objective and subjective standard for determining whether an appeal is frivolous: An appeal is considered frivolous “when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit.” (*Ibid.*) “The two standards are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay.” (*Id.* at p. 649.)

At oral argument, this court indicated that based on a review of the facts and the applicable law it was inclined to conclude this appeal was frivolous. It then asked counsel to explain why he believed this appeal had merit. The responses were less than availing.

In his briefing before the sanctions hearing, counsel was circumspect and admitted he could have done things differently. But counsel continued to assert he satisfied the first prong based on the defamation allegations and his recurrent theme was his approach was not objectively unreasonable and he simply failed to persuade the court. Again at the sanctions hearing, this court attempted to ascertain on what basis counsel concluded this appeal had merit. Given counsel’s fixed and firm belief his clients had only engaged in protected activity, the court’s efforts to have counsel address the question of what constituted protected activity were futile. Counsel again stated he failed his burden of persuasion. Efforts on the part of this court to engage in a substantive discussion as to the law and the facts of this case were futile.

“‘Sanctions may be ordered against a litigant [citation] and/or against the lawyer.’ [Citation.] Sanctions are warranted against a lawyer ‘who, because the appeal

was so totally lacking in merit, had a professional obligation not to pursue it.’  
[Citation.]” (*Workman v. Colichman* (2019) 33 Cal.App.5th 1039, 1065.)

Based on our independent analysis of this appeal and considering counsel’s explanation as to its merits, we find this appeal indisputably has no merit. Any reasonable attorney would agree the appeal is totally and completely without merit. Accordingly, we find the appeal to be frivolous and thus for purposes of delay. Therefore, we impose sanctions in the amount of \$500 payable to the court for the inconvenience to the court in hearing a frivolous appeal, the expenditure of court resources in processing the appeal, and negatively impacting the administration of justice.

We also caution counsel that when citing the record counsel must accurately and fairly summarize the facts. In initially reviewing the briefs, the court had concerns about appellate counsel’s representation of the record. On a couple of occasions, counsel states John “located and began following [12]-year-old” Little Doe and “initiated” an online friendship with her. As evidence John located and followed Little Doe on Instagram, counsel cited to Little Doe’s mother’s statement in her declaration that provides as follows: “I later discovered that . . . Sarno located and followed Little Doe on Instagram and began privately communicating with her via private Instagram messages on Feb. 16, 2016.” Not only is this statement vague, because it does not establish John followed Little Doe on Instagram before Little Doe contacted him on Instagram, it is also malicious, because it insinuates John affirmatively sought out a minor on social media after he met her at the park. The record before us establishes Little Doe initiated contact with John when she texted the MSF Instagram site to apologize she had not posted a photograph of the coin.

Counsel also asserts these conversations were private. The record before us demonstrates anyone with the MSF log in and password could view these messages. After counsel asserts John sent Little Doe private “flirtatious and wholly inappropriate” messages, counsel contends John tried to learn when Little Doe would visit Disneyland,

the innuendo being he was trying to arrange a private meeting. John's messages demonstrate Soto was invited to the barbeque, and John would be there with his wife. Such circumstances do not support a reasonable inference John was trying to arrange a private meeting with Little Doe for nefarious purposes as suggested by counsel's assertion.

Finally, appellate counsel states the following: "Concerned members of the Disneyland social club community began searching for publicly available information about [John] and were disturbed by what they found. Search resources included Google, Facebook, the Megan's Law database, Transparent California, the National Registered Emergency Medical Technicians, the California Emergency Medical Services Personnel Registry, and public records database Intelius." What does the reader of this paragraph focus on? A reasonable person could conclude John's name was on the Megan's Law Web site. The record includes no evidence John was on the Megan's Law Web site. Counsel states social club members were disturbed by what they found after conducting their investigation and cites to a single paragraph in four declarations.

In Alatorre's, Berganza's, Dominguez's, and Littlefield's declarations, the portion in question stated, "I began looking into [John's] charitable walks because I no longer trusted him and wanted to uncover further wrongdoing." Alatorre, Berganza, and Dominguez searched social media, background check, and government employee Web sites. Littlefield was the only person who searched the Megan's Law Web site. She did not state what she found although like the other three, actually the other 14 defendants, she stated, "Based upon the facts I have observed and the totality of the circumstances, I believe that [John] is a child predator and defrauded donors at the [MSF] [w]alk." Again, the record includes no evidence John was on the Megan's Law Web site. Perhaps this is why the trial court concluded all of the Defendants' declarations "were of no impact." We caution appellate counsel not to overstate or misrepresent the record under the cloak

of effective advocacy because it, *at the very least*, violates court rules. (Cal. Rules of Court, rule 8.204(a)(1)(C)).

#### DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal. In addition, respondents shall recover the total amount of their attorney fees as apportioned by the trial court among the appellants.

As sanctions for bringing this frivolous appeal, Ryan T. Darby, California State Bar No. 264357, shall pay \$500 to the clerk of this court and the clerk of this court is directed to deposit said sums in the general fund. The sanctions shall be paid no later than 15 days after the date the remittitur is issued.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.